RECORD, CASE No. 13,759.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 172.

FREDERICK HOLLENDER AND CHARLES TIELE[illegible],
PLAINTIFFS IN ERROR,

vs.

DANIEL MAGONE, COLLECTOR OF THE PORT OF [illegible]
YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES [illegible]
THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 14, 1892.

federal question was not raised, because the decisions of the Supreme Court of the United States are final and authoritative upon such a question, and must be followed notwithstanding the previous decision of the State Court.

Boyd vs. Alabama, 94 U. S. 645.
Willis vs. Owen, 43 Texas, 41-8.
Ulman vs. M. & C. C., 72 Md. 588.

In order that a judgment or decree may be set up as a bar by plea, or relied on as evidence by way of estoppel, it must have been made by a Court of competent jurisdiction, upon the same subject-matter, between the same parties and for the same purpose.

Washington, &c., vs. Sickles, 24 How. 333.
S. C., 5 Wall. 580.
Aspden vs. Nixon, 4 How. 467.

As to Question on which Jurisdiction depends being frivolous.

The question on which jurisdiction depends in this case is not frivolous as has been attempted to be shown; but when a federal question is clearly raised there is jurisdiction, however frivolous the objection.

Hall vs. Jordan, 15 Wall 393.

In chancery cases or other cases where the evidence becomes a part of the record in the highest Court of a State, the Supreme Court can review the law and the facts, so far as is necessary to determine the validity of the right set up under the act of Congress.

Boggs vs. Merced Mining Co., 3 Wall. 304.
River Bridge Co. vs. Kansas P. Rwy., 92 U. S. 317.

WILLIAM COLTON,
Counsel for Plaintiff in Error.

149 U.S. 586

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Frederick Hollender and Charles Tielenius, plaintiffs, and Daniel Magone, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 863. 12009. Supreme Court of the United States. Frederick Hollender *et al.*, plaintiffs in error, *vs.* Daniel Magone, defendant in error. Writ of error. Charles Curie, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 24th day of Sept., 1889. Edward Mitchell, attorney for defendant in error. U. S. circuit court. Filed Sep. 24, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto,

do hereby certify that the following pages, numbered from three to thirty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Frederick Hollender and Charles Tielenius, plaintiffs in error, against Daniel Magone, defendant in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

FREDERICK HOLLENDER, CHARLES TIELENIUS, Plaintiffs, *against* DANIEL MAGONE, Defendant. } Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Jan'y 14, 1888.

CHAS. CURIE,
Plaintiffs' Attorney.

Offices, Nos. 44 Exchange place, New York city.

4 [Endorsed:] 12009. No. 1. N. Y. superior court. Frederick Hollender & *al.*, plaintiffs, against Daniel Magone, defendant. Summons. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. Received Jan. 17, 1888, U. S. attorney's office. Due service hereof admitted this 14 day of Jan'y, 1888. Personally served Jan. 14, 1888. Custom-house, New York.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in [L. S.] the second circuit, shall be certified of a certain cause commenced before you against Daniel Magone, defendant, by Frederick Hollender & *al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 31 day of Jan'y, 1888, as fully and amply as the same are re-

maining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 27 day of Jan'y, in the year one thousand eight hundred and eighty-eight.

TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] 12009. U. S. circuit court. Frederick Hollender & *al. vs.* Daniel Magone. Copy certiorari. Edward Mitchell, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Jan'y 27, 1888. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. C., plaintiffs' attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, Jan'y 27, 1888. Chas. Curie, plaintiffs' attorney.

7 Circuit Court of the United States for the Southern District of New York.

FREDERICK HOLLENDER, CHARLES TIELENIUS, Plaintiffs,
against
DANIEL MAGONE, Defendant.
} Complaint.

Plaintiff- complains—

1st. That defendant was, during the time hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiff- *was*, during said times, in trade under the firm name of F. Hollender & Co., and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant as such collector exacted from plaintiff- as and for duties thereon and plaintiff-, in order to obtain said goods, *was* compelled to pay and did pay the sum of seventeen hundred & $\frac{50}{100}$ dollars in excess of the amount required by law.

4th. That plaintiff- filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto and also as above stated.

5th. That plaintiff- made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the

payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiff- and is still due and owing to *him*.

Wherefore plaintiff- demands judgment against defendant for seventeen hundred & $\frac{59}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

8 [Endorsed:] 12009. U. S. circuit court. Frederick Hollender & *al.*, plaintiffs, against Daniel Magone, defendant. Complaint. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. Received Feb. 4, 1888. U. S. attorney's office.

9 *Bill of Particulars.*

Name of importer, —— ——.

Description of goods: Beer (damaged). 216.
Whence imported: Hamb'g.
Name of vessel: Gellert.
Date of invoice: Oct. 1, 1886.
Date of entry at custom-house: Oct. 18, 1886.
Amount of duty illegally exacted: $1,700.50.
Date of payment of duties in excess: Oct. 18, 1886.
Protest filed: M'ch 23, 1887.
Date of appeal to Secretary of the Treasury: M'ch 23, 1887.
Date of Secretary's decision: Oct. 19, 1887.

10 [Endorsed:] 12009. U. S. circuit court, southern district of New York. Frederick Hollender & *al.* against Daniel Magone. Bill of particulars. New York, Feb'y 4, 1888. To Stephen A. Walker, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiffs' bill of particulars. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. Received Feb. 4, 1888. U. S. attorney's office.

11 Circuit Court of the United States for the Southern District of New York.

FREDERICK HOLLENDER *et al.*
versus
DANIEL MAGONE, Collector, etc. } N. S. 12009.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate

of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant as collector or otherwise the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And, further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon, or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of the plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And, further answering, the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 [Endorsed:] 12009. U. S. circuit court, southern district of New York. F. Hollender *et al. vs.* Daniel Magone, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, Ap'l 7, 1888. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't. Due service of a copy of an answer of which the within is a copy and of the above notice is hereby admitted. Dated New York, Ap'l 7, 1888. Chas. Curie, attorney for plaintiffs.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 9th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable E. Henry Lacombe, circuit judge.

FREDERICK HOLLENDER *et al.*
vs.
DANIEL MAGONE. } 12009.

Now come the plaintiffs, by Stephen G. Clarke, Esq., their attorney, and move the trial of this cause.

Likewise comes the defendant, by Henry C. Platt, Esq., assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the plaintiffs and the argument of counsel—

On motion of Henry C. Platt, Esq., the jury, by direction of the court, say that they find a verdict for the defendant, and so they say all.

On motion of Edwin B. Smith, Esq., it is ordered that the plaintiffs have a stay of sixty days within which to make and serve a case, with leave to turn the same into a bill of exceptions.

An extract from minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

14 United States Circuit Court, Southern District of New York.

FREDERICK HOLLENDER & *al.*
vs.
DANIEL MAGONE. } Judgment.

SEPT. 13TH, 1889.

The issues in this action having been brought on for trial before Mr. Judge E. Henry Lacombe and a jury, at a circuit court of the

April term, 1889, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 9th day of May, 1889, and his costs having been adjusted at $48.85—

Now, on motion of Stephen A. Walker, United States attorney, for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 13th day of September, 1889.

GILBERT E. ROGERS,
Deputy Clerk.

15 [Endorsed:] 12009. United States circuit court. Frederick Hollender & *al. vs.* Daniel Magone. Judgment-roll. Stephen A. Walker, United States attorney, attorney for defendant. Filed —— —, 188–. Costs, $——. U. S. circuit court. Filed Sep. 13, 1889. John A. Shields, clerk.

16 United States Circuit Court, Southern District of New York.

FREDERICK HOLLENDER and CHARLES TIELENIUS *vs.* DANIEL MAGONE. } Bill of Exceptions.

Afterward and on the 9th day of May, 1889, at a stated term of this court held in the city of New York the issues in this case came on for trial before the Honorable E. Henry Lacombe, a judge of this court, and a jury duly empaneled to try the issues therein.

The plaintiffs imported by the steamer Gellert and entered at the port of New York October 19th, 1886, two lots, of one hundred and thirteen casks each, of beer, amounting in all to twenty-eight hundred and sixty-one gallons, upon which beer plaintiffs duly made an application for damage allowance as follows:

17 *Application for Damage Allowance.*

To the collector of customs.

SIR: An order to ascertain and estimate the damage on—

341. Oct. 26. H. H. C.

Marks.	Numbers.	Description of merchandise.
Pschoor------	----------	One hundred & thirteen (113) casks.
Bran --------		
" --------	----------	One hundred & thirteen (113) casks. Beer.

Value, entry, six hundred & sixteen ($616) dollars.

Goods can be seen at importers' store, 115–'19 Elm street, at once.

[Written across the face:] Entered Oct. 16, '86. (Bill.)

—imported by F'd'k Hollender & Co. in the Str. Gellert, —— ——, master, from Hamburg, is respectfully requested.

FRED. HOLLENDER & CO.

Oct. —, 1886.

Oath of Applicant.

I, C. Tielenius, of the firm of F'd'k Hollender & Co., do solemnly swear that I have personally inspected and examined the merchandise described in the foregoing application; that the same has sustained damage on the voyage of importation and has not been landed ten days from the vessel in which the importation was made.

C. TIELENIUS.

Sworn before me this 26th day of October, 1886.

MASON, *Collector.*

Insert whether owner or agent of owner.
Insert nature of damage, whether by fire, water, or heating.

General customs regulations of 1884.

Form 118.

Appraisement Order to Ascertain Damage.

CUSTOM-HOUSE, PORT OF NEW YORK,
COLLECTOR'S OFFICE, —— —, 188–.

To the United States appraisers:

You will estimate and ascertain the damage sustained on the voyage of importation on —, imported by —— —— in the — —— from ——, in pursuance of the annexed application and therein fully described and report to this office the result of your examination.

Respectfully, —— ——, *Collector.*

18 A duty of twenty cents a gallon was assessed and paid to the collector, the defendant in this suit, under protest filed in due time, the substance of which protest is as follows:

"Hon. Daniel Magone, collector of customs, New York.

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on our importations below mentioned, consisting of certain lager beer in casks, damaged by souring during the voyage of importation so as to be totally unfit for use as a beverage and having no commercial value for any purpose in its damaged condition.

Claiming that under sec. 2927, U. S. R. S., rebate from the duties paid should be allowed to the extent of the damage sustained; that we made due application for such damage, which was illegally denied by you.

We further claim that the proviso in Sch. H, act M'ch 3, '83, that there shall be no allowance for breakage, leakage, and damage on wines, liquors, or distilled spirits, has no application to beer. We further claim that special proviso has no application to the case

in question. We claim total damage on 226 casks, containing, say, 2,861 gallons."

Appeal was also duly taken and suit commenced in due time.

19 CHARLES TIELENIUS, a witness on behalf of plaintiffs, being duly sworn, testified in substance as follows:

I am one of the firm of Hollender & Co., plaintiffs herein. We import beer from Germany. I remember the importation described in the two invoices in evidence here. The application, Exhibit 4, I signed personally. Prior to making that application we had examined the beer; as soon as the papers went through the custom-house and as soon as it was paid we got it into the building; we cannot examine it before that; as soon as we had it in the building we found it was spoiled. There were 226 casks. About forty or fifty half barrels of this we sold to vinegar manufacturers for three cents a gallon. They had no use for any more of it. This was the best price we could get. The rest of it we emptied and let it run away. The condition of the beer when it arrived was seemingly all right; the casks appeared to be in good order and we paid the duty, but when we received it at the store we found the beer was very lively. On opening the casks they almost exploded. It was entirely spoiled and unfit for sale.

Being cross-examined by defendant's counsel:

This beer was made by a brewer whose name was Barker; it was called Pschorr beer—a kind of lager beer. We realized about $25 from the sale of the beer to the vinegar manufacturers. We examined all the casks; we let them alone to get the examination
20 of the custom-house appraiser, and then afterwards we dumped it to be able to reship the empty barrels. I did not see any of this beer before it was put on board the vessel on the other side. It came from Munich, in Bavaria, Germany, to Hamburg in refrigerator cars, and was shipped from there. I did not see the beer nor any part of it until it arrived here. We take the beer away from the dock as quickly as we possibly can. It may have been there a day or possibly a day and a half. As soon as it is gauged and we get notice it is gauged by the custom-house authorities we take it away. It takes about half a day to get it all to our place. We have been in the habit of importing a similar beer to this for years, and ordinarily it arrived in good order and condition. This undoubtedly, in my opinion, became damaged by the heat, but I have no personal knowledge.

By Mr. CLARKE:

Q. You have handled beer for a good many years?

A. Yes, sir.

Q. And know about the keeping of it and what occasions damage to it?

A. Yes, sir.

Q. If the district attorney does not object you may state your opinion as to how that became damaged.

Counsel for defendant objected to the question as incompetent and irrelevant. The court sustained the objection, and counsel for plaintiffs duly excepted, and the exception was allowed. This beer was of the same strength as the domestic lager beer sold in this country.

21 LOUIS MULLER, a witness called on behalf of the plaintiffs and being duly sworn, testified in substance as follows:

I have been book-keeping in a brewery for eight years and have been established for myself this 25 years in a restaurant. I have imported wines and have dealt in wines, liquors, and beer. On March 3rd, 1883, the term "liquors" had a trade meaning. It was all spirituous, distilled liquors, with a certain percentage of alcohol. The term "liquors" in March, 1883, did not include beer.

On cross-examination this witness testified: I am acquainted with fermented liquors. The term fermented liquors in the trade means such beverages as have gone through fermentation. Beer goes through fermentation. In a certain sense beer and ale are included in the term fermented liquors in the trade. There are distilled liquors and fermented liquors known to the trade, and were so known in 1883 and prior thereto. I sell both fermented liquors and distilled liquors.

EMIL UNGER, a witness called on behalf of the plaintiffs and being duly sworn, testified in substance as follows:

I have resided in this city since 1852. I have been an importer of wines and liquors since 1858. On March 3rd, 1883, the term "liquors" had a trade meaning in trade and commerce of this country. "Liquor is a liquid with a considerable strength of alcohol." That term did not include beer.

22 Being cross-examined by defendant's counsel:

I deal in fermented wines and in distilled liquor and in no other kind of fermented liquors except wine. My trade is exclusively in distilled liquors, with the exception of fermented wines. I have an internal revenue license as a wholesale liquor dealer.

It further appeared from the invoices and the testimony of the liquidating clerk from the custom-house that the cost of this beer in Germany, the place of export, was equivalent to $17\frac{70}{100}$ cents per gallon in the money of account of the United States, and it was conceded by counsel for plaintiffs that the beer in question contained about four per cent. of alcohol, the usual amount contained in lager beer.

Both parties having rested, counsel for the defendant moved the court to direct the jury to find a verdict for the defendant; which motion the court granted and directed the jury accordingly; to

which ruling and direction counsel for plaintiffs then and there duly excepted, and the exception was allowed.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken, made, and allowed do not appear upon the records of the trial, therefore, upon the prayer of the plaintiffs, by their counsel, said judge has signed and sealed the foregoing as and for the bill of exceptions in this case as of the 9th day of May, 1889.

E. HENRY LACOMBE.

Consented to.
S. A. WALKER, *U. S. Att'y.*
CHAS. CURIE, *Att'y for Pl'ff.*

23 (Endorsed:) No. 12009. U. S. circuit court, southern dist. of New York. Frederick Hollender *et al. vs.* Daniel Magone. Bill of exceptions. Charles Curie, attorney for plaintiffs, 44 Exchange place, N. Y. city. U. S. circuit court. Filed Sep. 11, 1889. John A. Shields, clerk.

24 Supreme Court of the United States.

FREDERICK HOLLENDER and CHARLES TIELENIUS, Plaintiffs in Error, *vs.* DANIEL MAGONE, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Charles Curie, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

CHARLES CURIE,
Attorney for Pl'ffs in Error.

25 [Endorsed:] 12009. United States Supreme Court. Frederick Hollender *et al.*, plaintiffs in error, *vs.* Daniel Magone, defendant in error. Assignment of error. Charles Curie, attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 24th day of Sept., 1889. Edward Mitchell, attorney for defendants in error. To —— ——, attorney for — in error. U. S. circuit court. Filed Sept. 24, 1889. John A. Shields, clerk.

26 Supreme Court of the United States.

FREDERICK HOLLENDER & *al.*, Plaintiffs in Error,
v.
DANIEL MAGONE, Defendant in Error.
} Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Att'y, Attorney for Defendant in Error.

27 [Endorsed:] 12009. United States Supreme Court. Frederick Hollender & *al.*, plaintiff- in error, *vs.* Daniel Magone, defendant in error. Joinder in error. Edward Mitchell, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 25th day of Sept., 1889. Charles Curie, attorney for plaintiff- in error. To Charles Curie, Esq., attorney for plaintiff- in error. U. S. circuit court. Filed Sep. 25, 1889. John A. Shields, clerk.

28 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

FREDERICK HOLLENDER and CHARLES TIELENIUS,
Plaintiffs in Error,
vs.
DANIEL MAGONE, Defendant in Error.
} Bond for Costs.

Know all men by these presents that we, Charles Tielenius and Jaroslav Hussa, are held and firmly bound unto the above-named Daniel Magone in the sum of two hundred and fifty dollars, to be paid to the said Daniel Magone; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 14th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES TIELENIUS, [L. S.]
Of Firm Fred. Hollender & Co., 49 Beaver St., N. Y. City.
J. HUSSA, [L. S.]
162 East 105th St., N. Y. City.

Sealed and delivered and taken and acknowledged this 14 day of September, 1889, before me—

[L. S.] WILLIAM H. NORTHUP,
Notary Public, Kings County.

Certificate on file in New York county.

29 [Endorsed:] 12009. U. S. circuit court, southern district of New York. Frederick Hollender *et al.*, pl'ffs in error, *vs.* Daniel Magone, def't in error. Bond for costs on writ of error. Approved as to form, amount, and sufficiency of surety Sept. 24, 1889. E. Henry Lacombe. U. S. circuit court. Filed Sept. 24, 1889. John A. Shields.

UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

Jaroslav Hussa, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

J. HUSSA.

Sworn to this 14th day of Sept., A. D. 1889, before me—

WILLIAM H. NORTHUP,
[L. S.] *Notary Public, Kings County.*

Certificate on file in New York county.

30 UNITED STATES OF AMERICA, *ss:*

To Daniel Magone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Frederick Hollender and Charles Tielenius are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties *on* that behalf.

Dated September 24th, 1889.

E. HENRY LACOMBE.

31 [Endorsed:] E. & A. A. 863. 12009. U. S. Supreme Court. Frederick Hollender *et al.*, plaintiffs in error, against Daniel Magone, defendant in error. Citation. Charles Curie, attorney for plaintiff- in error. Due service of a copy of the within citation is hereby admitted this 24th day of Sept., 1889. Edward Mitchell, attorney for defendant in error. U. S. circuit court. Filed Sep. 24, 1889. John A. Shields, clerk. 25 ch'd.

Endorsed on cover: Case No. 13,759. S. New York C. C. U. S. No. 172. Frederick Hollender and Charles Tielenius, plaintiffs in error, *vs.* Daniel Magone, collector of the port of New York. Filed October 14, 1889.

149 U.S. 586

Office Supreme Court U. S.
FILED.
MAR 20 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 172.

FRED. HOLLENDER ET AL.

against

DANIEL MAGONE.

PLAINTIFFS' BRIEF.

EDWIN B. SMITH,
No. 120 BROADWAY,
New York,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

No. 172.

FREDERICK HOLLENDER ET AL.

AGAINST

DANIEL MAGONE.

PLAINTIFFS' BRIEF.

Statement.

October 19, 1886, plaintiffs imported and entered at New York 226 casks (aggregating 2,861 gallons) of beer, valued $616, upon which the defendant-collector exacted duty at twenty cents a gallon ($576.20), paid under protest, the beer having soured and become worthless on the voyage of importation. Plaintiffs applied Oct. 26, 1886, for a rebate on account (and to the extent) of this damage, under R. S. sec. 2927, but the defendant refused it, deeming such damage-allowance prohibited, as to this merchandise, by the proviso to schedule H, act of Mch. 3, 1883 (22 Stats. 505), which says there shall be no allowance for damage on wines, liquors, cordials or distilled spirits. In their protest, the plaintiffs denied the applicability of this proviso to beer; and thereupon, all due formalities having been observed, instituted this action to re-

cover the money so exacted by plaintiff as collector from them. (Rec. 7 to 9.)

The invoice showing the cost in Germany to be $17\frac{7}{10}$ cents a gallon, and usage of dealing for years having indicated that this was sound beer when shipped, and had soured by heat in crossing the Atlantic *(Id. 9)*, testimony was introduced showing that the term 'liquors' had a meaning in trade, restricting it to spirituous, distilled liquors with a certain percentage of alcohol, and, positively, that in trade it did not include beer. *(Id. 10.)*

It was conceded that this beer contained four per cent of alcohol, the usual percentage found in lager beer. *(Ibid. bottom.)*

A witness in behalf of plaintiffs, qualified by long experience, was asked to state his opinion, how this beer became damaged. Upon the U. S. Attorney's objection, the Court excluded the question, and the plaintiffs excepted. *(Id. 10 top.)*

Upon defendant's motion, the Court directed a verdict for the defendant; to which ruling and direction the plaintiffs excepted. *(Id. 10, 11.)*

Such verdict was accordingly rendered by direction *(Id. 6)* and judgment entered thereon. *(Id. 6, 7.)*

Statutes.

The application having been made within the limit of ten days after entry (Rec. 7, fols. 16, 17) only the first sentence of the section of the revision need be referred to here. In exactly, or substantially, this language, it has been upon the statute-book since March 2, 1799;—

"SEC. 2927. In respect to articles that have been damaged during the voyage, whether subject to duty *ad-valorem*, or chargeable with a specific duty, either by number, weight or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate or percentage of damage, so ascertained and certified, shall be deducted from the original amount subject to a duty *ad-valorem*,

or from the actual or original number, weight or measure, on which specific duties would have been computed." . . . . . (R. S. (2d ed.) p. 566.)

U. S. vs. Phelps, 20 Blatc. 129.
Affirmed, 107 U. S. 320.

Schedule H, 'Liquors,' Act of March 3, 1883, commences with "champagne, and all other sparkling wines";—its second paragraph relates to "still wines" concluding with this proviso;—

"That there shall be no allowance for breakage, leakage, or damage, on wines, liquors, cordials, or distilled spirits." (22 Stats. 505.)

Assignment of Errors.

The plaintiffs in error assign for error:

(1.) The exclusion of this question, put by plaintiffs' attorney to Charles Tielenius, a witness called in behalf of the plaintiffs;—and the Court's refusal to allow said witness to answer this question, to wit;—

"Q. If the district-attorney does not object, you may state your opinion, as to how that became damaged?" (Rec. 10 top.)

II. The granting of defendant's motion, to have a verdict directed in his favor. (Rec. 10 bottom.)

III. The direction of the Court to the jury to find a verdict for the defendant. *(Ib.)*

IV. The verdict, rendered by direction of the Court, in favor of the defendant. (Rec. 6, fol. 13.)

V. The judgment in favor of the defendant, entered upon the verdict so directed and rendered in his favor. (Rec. 6, 7.)

POINTS.

I.

The custom-house liquidating clerk testified (Rec. 10, fol. 22) that it appeared from the invoices, after he had reduced their German currency to its equivalent in our own, that the beer cost there $17\frac{7}{10}$ cents a gallon= $506.40. The duty added ($572.20) made a dead loss of $1,078.60 to the plaintiffs.

Speaking of the invoice, as furnishing the basis of duty, Daniel Webster observed in the Senate, May 9, 1828, that " when not suspected to be false or fraudulent, the invoice is the regular proof of value." (3 Webst. Wks. 233.

Tappan v. U. S., 2 Mas., 402 top.

The administration of our customs-laws hedges this document about with observances, to assure its accuracy. It is made in triplicate ; certified by consuls ; verified by oaths ; and its falsification punished by forfeitures and severe penalties.

But in the ordinary course of mercantile transactions, and irrespective of statutory requirements, it is ordinarily received and relied upon as evidence of the cost or value of the property to which it relates.

Plank v. Gavila, 3 C. B. (N. S) 806.
Graham v. Pa. Co. 2 Wash. 124.
Field v. Moulson, *Ibid.* 155.
Leroy v. Un. Co. 7 Johns. 354.
Sturm v. Williams, 6 J. & S. 342.
Cliquot's Champagne, 3 Wall. 141.
Fennerstein's Ibid., 148.
Lady Franklin, 8 *Id.* 329.
J. W. Brown, 1 Biss. 79.

A sound price *prima facie* imports a sound article, of merchantable quality ; and it will not be conjectured that a vendor fraudulently sold sour beer at the price of, and as being, good ; especially when the ques-

tion is whether or not the purchaser shall be held to pay $572 of duties upon an importation discovered to have become valueless.

Jones v. Just, L. R. 3 Q. B. 203.
Kellogg v. Hamilton, 110 U. S. 114–5.
Henshaw v. Robbins, 50 Mass. 83.
Lush v. Druse, 4 Wend. 315.

The Treasury Regulations recognized and sanctioned this method of establishing the original soundness of merchandise upon which a damage allowance is claimed.

"The bill of lading may be accepted as *prima facie* evidence of sound shipment."

Treas. Regs., A. D. 1874, p. 220 top; Art. 519.
Do. 1884, p. 234, Art. 577, last line.
SS. 3869, Feb. 5, 1879 last line.

So, there was evidence of this beer being in good order when shipped from Germany, and positive proof of its sourness upon its arrival here. We should have been allowed to ask the expert-witness how it became thus damaged. (Rec. 10, top.)

He had, upon a preceding question by the U. S. Attorney—being the close of his cross-examination, attributed it to heat. (*Id.* 9 near bottom.)

II.

The capacity of the expert to so testify was not denied; but the testimony itself was objected to and excluded as incompetent and irrelevant.

It was held not competent to prove how the damage was incurred, because the fact of its existence was immaterial under the proviso forbidding any damage-

allowance "on wines, cordials, liquors, and distilled spirits." (*Ante*, p. 3.)

The word 'liquors' was supposed to include lager beer;—though the two preceding names would seem to indicate '*liqueurs*' as the article really meant. See the fifth succeeding paragraph, commencing 'cordials,' hereinafter mentioned. (22 Stats. 505.)

But whatever else was intended, the undisputed testimony withdrew our beer from the embrace of this term.

The positive, unimpeached and undisputed testimony was that—whatever might be the general understanding and popular significance of the term—"liquors," in the trade and commerce of this country, when the act of Mch. 3, 1883, was passed, had a trade-meaning which did *not* include beer. (Rec. 10, fol. 21.)

This Court has repeatedly declared that the first inquiry in the construction of tariffs and their nomenclatures is this:—Is there any peculiar meaning attached to the language and terms of the statute in trade and commerce? if so, what is it? It is not until nor unless the first question is negatively answered that further investigation becomes necessary. If a trade meaning is ascertained, it must be applied; and all other becomes inconsequential.

"The commercial designation, as we have frequently decided, is the *first* and most important designation," etc. (Citing cases.) "But *if the commercial designation fails*," etc. "*then* resort must necessarily be had to the common designation."

Robertson vs. Salomon, 130 U. S., 415.
200 chests Tea, 9 Wheat., 439.
Barlow vs. U. S., 7 Pet., 410.
112 casks, 8 *Id.*, 279.
Elliott vs. Swartwout, 10 *Id.*, 151-2.
Lawrence vs. Allen, 7 How., 791.
Arthur vs. Morrison, 96 U. S., 110.
85 Hhds., 2 Paine, 54; 7 Pet., 410.
Bacon vs. Bancroft, 1 Story, 341.

This rule applies to class terms as strongly, and upon the same reason, as to the denomination of articles by which they are bought and sold.

Pickhardt vs. Merritt, 132 U. S., 256–7.
Arthur vs. Cumming, 91 *Id.*, 363.
Same vs. Morrison, 96 *Id.*, 110.
Same vs. Lahey, *Ibid.*, 112.
Smith vs. Field, 105 *Id.*, 53.

This is not a canon of construction specially applied to tariff legislation. It is of universal application; that the subject must be placed in its true light, to understand the full meaning of what is said about it, whether in a statute, contract, or other writing; or in discourse.

"Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to the proper subject-matter."

3 Stark, Ev. 1083.

This statement of the rule by Mr. Starkie is approved in the 'leading case' of Smith v. Wilson, 3 B. & Ad. 166, where it was accordingly held that, as applied to the purchase and sale of a warren of rabbits, 'a thousand' meant 'twelve hundred'; as, not long ago, in the dealing with many commodities in this country 'a hundred weight' implied one hundred and twelve pounds; the word 'hundred' primarily having denoted a circuit or division, instead of any exact numeration.

This Court decided (7 Wall. 219) an unmarried female to be 'a single man'; the Court of Claims that a full-blooded negro was 'white person' (12 Ct. Clms. 704; 100 U. S. 235); and an English court, that 'white' might be shown, in mercantile transactions, to include dark or black. (Mitchell v. Henry, 24 Solr. J. 689.)

III.

It was error to direct a verdict against the positive testimony,as to the trade meaning of the word 'liquors'; so directing upon some judicial cognizance, or common knowledge, of the lexical meaning of the word; or the sense in which it has been employed in 'Maine laws,' or other prohibitory or license laws. The only pertinent inquiry is the *mercantile* understanding of the term.

TINDAL, C. J., interrupted Erle for the defendant with this advice :

"*It is a question of mercantile construction. You had better lay aside your dictionary.*"

Houghton v. Gilbert, 7 C. & P. 701.

Lexical definitions will be found to give first the most comprehensive meaning of 'liquor,' as synonymous with liquid; then, the more restricted one, applicable to intoxicants; followed by the narrowest, confining it to distilled spirits; the term being, *per se*, seldem or never applied to beer, but a compound word 'malt liquors' being so applied.

For example, see this, from the latest and best authority—the Century Dictionary ;—

"Liquor—(1) Any fluid substance, as water, milk, etc.; (2) an alcoholic or spirituous liquid, either distilled or fermented; an intoxicating beverage, *especially a spirituous or distilled drink*, AS DISTINGUISHED FROM FERMENTED BEVERAGES, as wine and beer."—Cent. Dict., *h. t.*

Townley v. St. 18 N. J. L. 321.
St. v. Brittian, 89 N. Car. 576,

where the Court observed ;--

"The proof was that the defendant sold 'liquors,' and it must be taken that he sold *spirituous* liquors. *Most generally, the term 'liquors' implies spirituous liquors.*" (89 N. C. 576.)

"Malt-liquor," though a compound word, describes a different *article*, and not merely a different *species*, from the word 'liquor;' as 'red-lead' and 'white-lead' differ from the lead consumed in their production.

Meyer vs. Arthur, 91 U. S. 477.

If, then, we feel ourselves at liberty to disregard the undisputed *trade* meaning, we find ourselves confronted by the fact that common usage sometimes employs the term (as applied to alcoholic beverages) in the wider sense which embraces them all, but more often in the narrower, confined to the products of the still:—and we must then inquire, in which sense is the word used in this statute.

The narrowest is called for by the context; else the enumeration of wines and cordials, etc., is superfluous.

It is called for by the equity of not imposing duty upon the original value of a thing destroyed or depreciated upon its way hither.

It is certainly demanded by anterior legislation upon the subject, as judicially construed.

IV.

The reason, as well as the equity, of the statute favors the construction for which we contend; it is supported by prior legislation, in *pari materia;* and indicated as the correct one by the decisions of this Court.

Recurring to Section 2504 of the Revised Statutes, and the enactments therein reproduced, we find that, in addition to the duties upon "wines, brandies and spirituous liquors," three cents was imposed by Schedule D upon each bottle containing such liquors;--but this Court held bottles holding beer to be dutiable at

30% *ad val.*, under Schedule B, providing for bottles "filled with articles *not otherwise provided for.*"

Schmidt v. Badger, 107 U. S., 85, 87.
Merritt v. Park, 108 *Id.*, 109.

An examination of the statutes carried back for fifty years confirms our conviction that, by a mistake of the clerk, stenographer or typewriter who took down the paragraph from dictation, or by that of the compositor who set it up, the word "liquors" was inadvertently substituted for "*liqueurs*," and the error crept unobserved into the statute-book, both in this clause and in that which defines the duty upon "cordials, *liquors*, arrack, absinthe," etc., where it obviously should read "*liqueurs.*" (22 Stats. 505.)

The "fifth" item of the eighth section of the tariff of 1842, c. 270, imposed a dollar a gallon upon brandy; "upon other spirits manufactured or distilled from grain or other materials," from sixty to ninety cents a gallon, according to the proof. After a half-page devoted to wines comes this provision;—

"On cordials and *liqueurs* of all kinds, sixty cents per gallon; on arrack, absynthe, Kirschenwasser, ratafia and other similar spirituous beverages, not otherwise specified, sixty cents per gallon," etc., etc. (5 Stats., 560.)

Schedule A, act July 30, 1846, consists of three lines, affecting with one hundred per cent. duty

"Brandy and other spirits distilled from grain or other materials; cordials, absynthe, curacoa, Kirchenwasser, *liquers*, maraschino, ratifia, and all other spirituous beverages of a similar character." (9 Stats., 44.)

Schedule C, same act, imposing 30 %, begins;

"Ale, beer or porter, in casks or bottles; argentine," etc. (*Ibid.*)

Item "First," sec. 6, Act Mch. 2, 1861, c. 68 places

$1 a gallon upon brandy; upon other spirits manufactured and distilled from grain, and on spirits from other materials, forty cents a gallon; then—

"On cordials and *liquors* of all kinds fifty cents per gallon; on arrack, absinthe, kirschenwasser, ratafia and other similar spirituous beverages," n. o. p., "fifty cents a gallon." (12 Stats. 180.)

The act of July 14, 1862, c. 163, sec. 2, put an *additional* duty of 25 cents a gallon on first proof brandy; on other spirits manufactured or distilled, etc., 50 cents a gallon;—

"On cordials and *liqueurs* of all kinds, and arrack, absinthe, kirschenwasser, ratafia, and other spirituous beverages, not otherwise provided for, twenty-five cents per gallon." *(Id.* 544.)

Here is a demonstration that the *additional* twenty-five cents upon '*liqueurs*' was added to the fifty cents theretofore payable upon 'cordials and *liquors*.'

Using the nomenclature of its immediate predecessor, the act of June 30, 1864, puts two dollars a gallon "on cordials and *liqueurs* of all kinds, and arrack," etc., etc. (13 Stats. 202, bottom.)

The act of July 14, 1870, c. 255, sec. 21 (16 Stats. 263), duties "cordials, *liqueurs*, arrack, kirchenwasser, vermuth," etc., etc. at two dollars, as before; first thus enumerating 'vermuth,' as to which the duty was changed by act of 1872; and these statutes were incorporated into the revision. (R. S., 2d Ed., p. 464.)

This clause has the same position, relation and purpose in the substitute act and title of 1883 (22 Stats. 505) that it had in the revision; 'liquors' being printed for 'liqueuers,' intending the article usually designated by the latter word; and that is what it means, too, in the clause to be construed.

The act of Feb. 8, 1875, was the first to work any change in the allowance act of 1799; by substituting a fixed percentage for breakage, in lieu of an ascertain-

ment of the number of bottles actually broken;—adding to the *still*-wine clause of section 2 this proviso:—

"*Provided, also*, that there *shall* be an allowance of five per centum, and no more, on all *effervescing* wines, liquors, cordials and distilled spirits, *in bottles*, to be deducted from the invoice quantity, in lieu of breakage." (18 Stats. 307, bottom.)

In the discussion of this act (Ho. Reps. No. 3572) there was no allusion to malt or fermented liquors.

When the act of March 3, 1883, was debated, Senator Beck referred to the fact that 5% was allowed, even though there had been no actual loss; and Senator Sherman, (14 Cong. Rec. p. 2700) refers to "liquors and wines," in comparing the pre-existing with the proposed proviso;—but neither of these, nor any other debater, mentioned beer, or had any thought of fermented liquors; but only of those specified in the act of 1875.

V.

Decisions founded upon prohibitory liquor-laws are generally mere construction of the particular statute upon which the prosecution is based, and of little value in any other connection.

Thus, it was under a statute requiring a license for the sale of "*strong* or spirituous liquors" that "*strong* beer" was deemed included.

Board v. Taylor, 21 N. Y. 173,

where the opinion is based wholly upon the adjective "strong." Earlier N. Y. cases, to like effect, are cited; *Ex gr.*, Board v. Freeoff, 17 How. Pr. 442; Nevin v. Ladue, 3 Denio, 43 (*reversed* in the Court of Errors, *Ib.*, 437).

In most of the prohibitory laws, beer, or cider, etc.

are specified; a tacit admission that, if unspecified, they would not be comprehended within the term 'liquors.'

State v. Goyette, 11 R. I. 592.
Com. v. Anthes, 12 Gray, 39.

In Arkansas *alcohol* was declared *not* to be "liquor of any kind."

St. v. Martin, 34 Ark. 340.

The meaning must always depend upon the particular statute; since, as HORNBLOWER, C. J. observed; "Liquor, the dictionary inform us, means anything liquid; but milk and water, or water and vinegar, or tea and coffee are liquors, and may be mixed," etc. Yet they were obviously not the mixed liquors of the statute.

Townley v. St. 18 N. J. L. 321.

"This law should be construed with reference to other laws upon the same subject; and thus construed, giving proper effect to the language used, and proper consideration to the mischiefs intended to be remedied, there can be no doubt of the legislative intention."

Rau v. Peo. 63 N. Y. 280.

Again comparing the earlier statutes *(ante*, pp. 10 to 12*)* with the act of 1883, we find, in all of them, brandy, spirits, wines, cordials, liqueurs (or 'liquors') absinthe, ratafia, etc., specified at great length; and then "other similar spirituous beverages"; while "ale, porter and beer" are invariably specified in a separate paragraph, at a different rate, accompanied by special provisions.

5 Stats. 560. Act of 1842.
9 " 44. " " 1846.
12 " 180. " " 1861.
12 " 544. " " 1862.
13 " 202. " " 1864.
Rev. Sts. p. 464
22 Stats. 505. Act, Mch. 3, 1883.

This continuous specification of cordials, liqueurs (or liquors) absynthe, etc., etc., for half-a-century would seem to indicate that the general term 'liquors' ought not to be construed to include 'beer,' always thus segregated for tariff purposes; as "birds, singing and other, and land and water fowls," following "animals of all kinds," was held to exclude birds from the provision of a later act relating to "horses, mules, cattle sheep, hogs, and OTHER *live animals*."

Reiche v. Smythe, 13 Wall. 162.

Giving "liquors," thus spelled, the most extended meaning, which the Court below adopted, renders the associated words "wines, liquors, cordials or distilled spirits," all utterly useless; while, if treated as meaning here what it has always heretofore meant *in this association (i. e. liqueurs)* the other words are not tautological.

The tautology of "cordials, liqueurs, absinthe, ratifia," etc., is that of fifty years standing, however originating—while it would be absurd to insert "*distilled* spirits," if 'liquors' was supposed here to include both fermented and distilled. We have noticed *(ante,* p. 8*)* that the word 'liquors' (so spelled) usually and especially indicates *distilled* spirits; to repeat that which everybody understands it to include, and omit that not ordinarily understood as comprehended in the term, would be peculiar legislation.

Certainly, beer is not its *primary* meaning.

The preceding language of the schedule, and that of prior legislation, indicates the subjects towards which the legislative mind was then directed.

VI.

The context shows *intoxicating* liquors to have been then in contemplation, when this proviso was adopted; and 'lager beer' is not so *per se;* while ours is proven to have possessed only the ordinary, trifling percentage of alcohol, (4 %) so as to be practically non-intoxicant. (Rec. 10 bottom.)

"But, as has been shown, lager-beer is not to be deemed intoxicating *without proof* of the fact."

Blatz v. Rohrbach, 116 N. Y. 455.
Intox. Liquors, 25 Kans. 767.
Hansberg v. Peo. 120 Ills. 21.

Any liquid may be declared so by statute (as 'malt-liquor' was in Illinois—*Ibid.*); but where the statute does not define, the question is for the jury.

Klare v. St. 43 Ind. 483.
Kurtz v. St. 79 Ind. 488.
St. v. Page, 66 Me. 418.
St. v. Starr, 67 Me. 242.
St. v. Riddle, 54 N. H. 379.
Com. v. Chappel, 116 Mass. 7.
Com. v. Bloss, *Ibid*, 56.

In this view as well as upon the testimony as to trade-meaning, it was error to direct a verdict.

The cause should have been submitted to the jury.

VII.

No sound argument can be founded upon the circumstance that the "Schedule H—Liquors" concludes were beers; for this is merely "for the purpose of a more convenient and orderly arrangement" (R. S. sec. 5600) and not as inferring any particular legislative construction *(Ib.)*

It would seem preposterous to require a separate alphabetical and entitled Schedule for beers, or for fermented liquors, to evidence a design not to include them in this proviso of schedule H.

That "liquors" sometimes includes beer, nobody denies; as it sometimes does milk, clam-juice, exuding gum and sap; but we assert that every circumstance ordinarily governing construction shows it is not here intended to include beer.

VIII.

The judgment of the court below should be reversed with costs.

If two constructions be possible, that favoring the citizen should be adopted.

EDWIN B. SMITH,
120 Broadway,
New York,
Of Counsel.

149 U. S. 5-86

Office Supreme Court U. S.
FILED.
APR 7 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

FREDERICK HOLLENDER AND CHARLES TIELENIUS, plaintiffs in error,
vs.
DANIEL MAGONE, COLLECTOR, ETC.
} No. 172.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY,
Assistant Attorney-General, and of Counsel, etc.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

This case arises upon an importation by plaintiffs in error, per steamer *Gellert*, on October 19, 1886, into the port of New York, of two lots of beer, consisting of 113 casks each.

A duty of 20 cents per gallon was assessed on the importation against the protest of the plantiffs in error, who claimed that the merchandise had been spoiled during the voyage by souring and that a rebate of duty should be allowed, under section 2927, Revised Statutes, to the extent of the damage sustained (p. 8); but the collector declined to allow the rebate demanded, holding that under

the proviso of paragraph 308 (T. I.) of Schedule H of the act of March 3, 1883, declaring "*that there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits,*" the merchandise in question was removed from the operation of section 2927.

This action was brought in the superior court of the city of New York to recover back the duty alleged to have been illegally exacted by the defendant in error, and was from thence removed, by *certiorari*, into the circuit court of the United States for the southern district of New York (pp. 2, 3).

The action was tried before Judge Lacombe and a jury on May 9, 1889, and resulted in a verdict for the defendant, by direction of the court (p. 6), and judgement was signed on September 3, 1889 (p. 7).

The bill of exceptions presents several questions of law (pp. 7–11), which will be noticed in the argument.

ARGUMENT.

I.

Apart from the act of March 3, 1883, and assuming for the sake of argument that the merchandise imported was not withdrawn from the operation of section 2927, Rev. Stats., the jury were properly instructed to find for the defendant, there being no evidence to show that the beer imported became damaged during the voyage.

The counsel for the plaintiffs in error has attempted to supply this defect in the evidence by an exercise of ingenuity. He argues that the invoice furnishes the required evidence in that it warrants the inference that the beer

in question was sound when purchased because a "sound price" was paid for it. But there is no evidence that the price of $17\frac{70}{100}$ cents per gallon, paid for it in Germany, was a "sound price." It is apparent, therefore, that the invoice needed to be supplemented by other evidence, and that, standing alone, that document fails to establish the important fact of the condition of the beer at the time of shipment.

But was the invoice admissible evidence for the purpose mentioned?

Because the statute authorizes the invoice to be taken at the custom-house as evidence of dutiable value does it, by any means, follow that it may be used as evidence by the plaintiff in a personal action against the collector to recover back money alleged to have been illegally exacted as a tax?

It is to be observed that the invoice is not invoked, as in Fennerstein's Champagne and Clicquot's Champagne (3 Wall., 141, 148), to prove market value, generally, but to prove that the particular merchandise now in question was in good condition when shipped for exportation to this country.

The invoice, as well as the bill of lading, is, as to the collector, sued here for an abuse of his official power, *res inter alios acta.*

No doubt the invoice is proper evidence to be considered by the collector in determning the amount of a claim for damage allowance. Being evidence for the ascertainment of dutiable value, it must also be evidence for the other purpose.

In commercial cases, the invoice is *prima facie* evidence. This is exceptional. In the case of *Graham* v. *Pa. Ins. Co.* (2 Wash., 113, 124), for which we are indebted to the brief of the other side, Mr. Justice Washington said:

> According to the general rules of law in other cases, *an invoice by itself would be inadmissible.* * * * But *in commercial cases* it is uniformly admitted, if it carries with it the proof of its fairness. It is not known to have ever before been questioned.

The case at bar, however, is not a commercial case, nor is it derived from the customs laws of the United States.

But it does not appear in the bill of exceptions, where all the evidence must be set out, that the invoice or bill of lading was read in evidence to the jury or was even offered. Neither of those documents is anywhere in the record, and, therefore, this court can not determine whether it was admissible for any purpose.

The case being destitute of evidence to show the condition of the beer when shipped to this country, a witness was asked (p. 10) to state his opinion as to how it became damaged, the object being, of course, to show that, in the witness's opinion, the beer became sour *during the voyage*, and not before shipment. There was certainly novelty in this attempt to get before the jury the witness's conjecture that the beer soured during the voyage and his opinion on that conjecture as to what caused it to sour.

The evidence was inadmissible, not only for the reason above stated, but also on the ground that the law made no provision for damage allowance in this case, as will be shown presently.

II.

On the trial two witnesses, one who had been bookkeeper in a brewery and was then *in a restaurant* and the other who was licensed as a wholesale liquor-dealer (p. 10), were examined for the purpose of showing that, at the time of the passage of the tariff act of March 3, 1883, which, as we have seen, took away the right to damage allowance on "*liquors*," the term liquors did not include beer as that term was used in trade and commerce.

This effort to eat away the sense of the word "*liquors*," as used in the statute, it is sought to support by an argument which depends on the doctrine that, where the legislature uses, in tariff legislation, *a commercial term or designation*, it is presumed to have used it in its commercial sense. But the doctrine invoked has no relevancy here, because "*liquors*" is not a term of trade and commerce and can not be filched from the general vocabulary for any such purpose.

Such attempts as this to elude the force of words of ordinary speech in statutes, on the pretext that they have some special use among those engaged in a particular trade, would lead to serious consequences if successful.

Which is the more rational view, that Congress, in putting an end to the right to damage allowance on "*liquors*," used that term as people generally used it, or had in contemplation what is set up here, upon a flimsy basis, as a trade sense of the word narrowed so as to exclude beer?

What is there said with regard to the attempt to change the natural meaning of the language of the statute by pretended commercial usage is just as applicable to the attempt in the case at bar to wrench the term *liquor* from its ordinary comprehensive sense.

It is admitted by the counsel opposite (brief, p. 9) that "liquor" has a legitimate sense which comprehends beer, and the bill of exceptions states (p. 10) that "it was conceded by counsel for plaintiffs that *the beer in question contained about four per cent of alcohol*, the usual amount contained in lager." At this point we would refer to the argument for the Government in this case in the court below, as reported in 38 Fed. Rep., 912.

III.

The effect of the provision of the act of March 3, 1883, denying the right to damage allowance on liquors under section 2927 (R. S.) is to restrict the operation of a law in *derogation of the revenue*, and, therefore, the provision should be *liberally* interpreted. There is no natural equity on the side of the importer to be exempt from paying duty on the invoice value of merchandise damaged in the course of the voyage. He takes the risk of such damage and depreciation with the law open before him, and he has no right to any exemption from paying the usual tax on his importation *unless it is clearly given him by the law*.

It is, therefore, somewhat remarkable that it should be argued here that the provision in question of the act of 1883, *repealing the preëxisting exemption from taxation*, should be strictly and narrowly construed.

We say, with some confidence, that every word of this repealing clause should be read in the most comprehensive sense that it will bear, for every presumption is against him who claims some particular immunity from the common burden of taxation.

Looking at the case from this standpoint, the labored attempt to *invent* a restrictive meaning for the repealing clause, and the invitation to this court to go the unheard-of-length of narrowing the sense of that clause by substituting the French word *liqueurs* for the English word *liquors* seem to reverse an established canon of interpretation. Such an argument would be novel in the interpretation of a criminal statute. It will be a long time, we take leave to say, before this court will be found exercising its ingenuity for the purpose of extending the operation of exemptions from taxation.

The supreme court of New York, in its opinion in *The People* v. *Crilley* (20 Barb., 248), gives this definition of liquors: "The word liquors, as commonly used, includes all that are spirituous, vinous, or inferior fermented, including malt." It is furthermore admitted by the other side, as we have seen, that the term *liquor* is comprehensive enough to embrace beer, outside of the provision of the act of March 3, 1883, now in question.

It would seem to follow, therefore, that the claim for damage allowance was without support, and that the judgment was correct and must be affirmed.

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